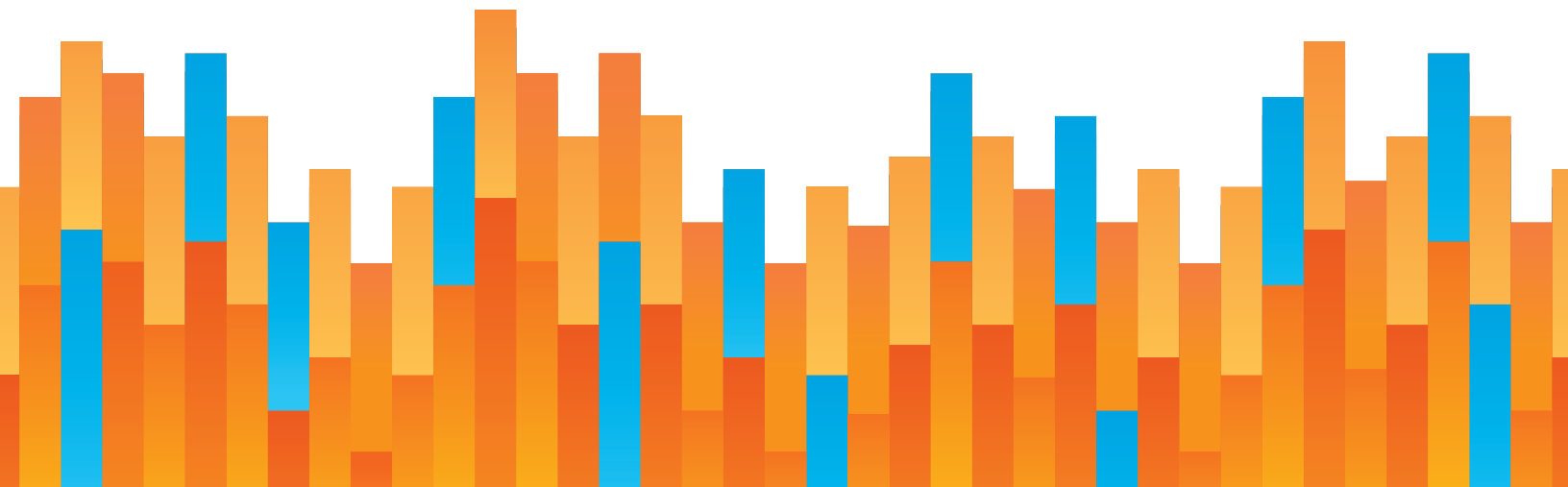




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MARIJUANA INDUSTRY FINANCIAL SERVICES: OBSTACLES AND SOLUTIONS

by Geoff Lawrence
September 2019





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EXECUTIVE SUMMARY

State-licensed marijuana businesses and their suppliers have difficulty getting access to basic financial services because federal law discourages banks from providing these services. This is counter to the explicit intention of key federal banking regulators, who have developed guidance for banks and voiced support for financial institutions to be able to serve marijuana businesses. Compliance with these guidelines is time-consuming and costly for financial institutions to complete, discouraging many banks from servicing marijuana-related businesses as compliance costs threaten to outweigh potential revenues.

Frustrated with this scenario, policymakers at the state level have sought to facilitate financial services for the marijuana industry through proposals to create entirely new financial institutions. Those attempts have all faced major obstacles, such as the Federal Reserve's refusal to grant these entities a master account to participate in the interbank payment portals it administers. New financial institutions chartered to service marijuana businesses may also have difficulty acquiring federal deposit insurance.



Excluding marijuana-related businesses from basic financial services creates significant downsides. It forces marijuana businesses to transact mainly in cash, and to store and transport large volumes of physical cash.



Excluding marijuana-related businesses from basic financial services creates significant downsides. It forces marijuana businesses to transact mainly in cash, and to store and transport large volumes of physical cash. As a result, the potential for robbery risks public safety. Many marijuana companies also remit tax payments in cash, which exposes government employees to similar risks. Beyond these direct risks to physical safety, cash-intensive businesses are difficult to audit for compliance or tax purposes because there are no bank records to review. Thus, denying marijuana-related businesses the legitimate financial services available to other businesses prevents oversight, facilitates illegal sales, and may allow these businesses to conceal tax liabilities. These effects directly contravene three explicit goals of legalization: generating new tax revenue, discouraging the black market, and managing access to marijuana products.

Congress can ameliorate these problems by passing legislation to allow marijuana businesses to access the banking system like any other business. Alternatively, states and private entrepreneurs can facilitate financial services for the marijuana industry. Chiefly, states can ease the reporting requirements imposed on existing financial institutions by sharing data on licensees and individual marijuana transactions with financial institutions through a data-sharing portal. Likewise, private entrepreneurs can design a cryptocurrency-based solution to offer a compliant alternative to marijuana businesses.

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INTRODUCTION

In 1996, California voters boldly bucked federal law by approving Proposition 215, which made marijuana legal within the state for medical purposes. While it was not the first state legislation to legalize and regulate marijuana,¹ this was the first such law to be broadly implemented. Since that time, voters or lawmakers in 32 other states have passed laws that legalize marijuana for medical purposes, and 11 states have legalized marijuana for recreational purposes.

Meanwhile, the federal government continues to list marijuana as a Schedule I controlled substance under the Controlled Substances Act, which subjects its manufacture, sale and possession to criminal penalties. Over the past two decades, this state-level marijuana legalization in direct contravention of federal law has been called the most important federalism issue of our generation.

In recent years, federal authorities have granted states some leeway in how they enforce federal law regarding the manufacture, sale and possession of marijuana. However, one

¹ For a review of state efforts to regulate marijuana, see: Lawrence, Geoffrey. “Cannabis and States’ Power: A Historical Review of State Efforts and Authority to Regulate Cannabis.” Reason Foundation, April 2019. <https://reason.org/wp-content/uploads/cannabis-and-states-power-historical-review-of-regulation.pdf>.

aspect critical to any legitimate marijuana business has remained elusive due to federal control: access to financial services. Marijuana businesses generally are unable to establish accounts with banks and payment processors, apply for business loans, or make electronic payments to employees, vendors or even tax authorities. Not only does this make every transaction within the industry highly inefficient, but the presence of large volumes of cash are a security concern for legitimate businesses, their employees, and even public officials who must receive tax payments in cash. Due to the lack of a paper trail, cash businesses can disguise revenue to evade tax liabilities or conceal illicit activity and these actions are not easily discovered. Instead of addressing these clear threats to public safety and possible financial crimes, federal action continues to bar marijuana businesses from access to financial services.



... one aspect critical to any legitimate marijuana business has remained elusive due to federal control: access to financial services.



In an attempt to solve this problem, some marijuana-legal states have chartered state-level financial institutions to service the legal marijuana industry. Every one of these attempts has met insurmountable obstacles due to the pervasiveness of federal regulations on the banking industry. Despite these previous failed attempts, pathways to facilitate access to the banking system for state-licensed marijuana businesses do exist. This brief explores actions states and private entrepreneurs can take to facilitate financial services for the legal marijuana industry regardless of federal obstruction.

Part 2 reviews the relevant laws and regulations with which financial institutions must contend if they wish to offer financial services to a marijuana business. Part 3 reviews an attempt by the state of Colorado to charter a credit union that would service the marijuana industry and the obstacles it encountered. Part 4 discusses a feasibility study undertaken by the California Treasurer's Office regarding the establishment of a state bank for marijuana businesses. Part 5 summarizes the key legal and regulatory obstacles policymakers and private entrepreneurs must consider in order to facilitate financial services for state-licensed marijuana businesses, and provides recommendations for how these can be overcome *even in the absence of federal action to clarify the issue*. Part 6 concludes with a

critical analysis of the potential ramifications of federal actions or inaction that exclude marijuana-related businesses from access to financial services.

In addition to the many sources cited throughout this paper, the author draws heavily upon personal knowledge and experience in the area of marijuana finance. As senior appointee to the Nevada Controller's Office, the author participated in a working group of state financial officials that examined options for state action to facilitate banking for the marijuana industry. Later, as chief financial officer of a publicly traded marijuana company listed on a U.S. exchange, the author navigated the intersection of federal securities laws with state marijuana laws. This provided hands-on experience with large volumes of cash transactions over which financial controls suitable to public company standards and regular financial audits were required. These experiences have been vital to the development of this paper.

THE CURRENT REGULATORY ENVIRONMENT FOR BANKING MARIJUANA BUSINESSES

Financial institutions in the United States are governed by a labyrinth of laws and regulations at both the state and federal levels. Financial institutions can choose the jurisdiction in which to seek a charter, including either at the federal level through the Comptroller of the Currency or with the respective banking regulator in the state or states in which they operate. However, receipt of a state charter does not remove a financial institution from federal oversight. In particular, federal law mandates that financial institutions adhere to the provisions of the federal Money Laundering Control Act and Banking Secrecy Act (BSA). These acts effectively conscript financial institutions to assist federal law enforcement by actively monitoring and analyzing financial transactions to determine whether federal money laundering has occurred.

Additionally, all depository institutions in the United States, including banks and credit unions, must maintain deposit insurance, which is provided almost exclusively by federally chartered entities. The Federal Reserve controls major interbank payment systems, and

federal criminal statutes may subject any financial institution that offers financial services to a state-licensed marijuana business to prosecution for “aiding and abetting” a criminal act. All of these issues have obstructed marijuana-related businesses’ attempts to access financial services.

However, federal regulators charged with enforcing these laws have indicated support for allowing financial institutions to service marijuana-related businesses that follow certain guidelines by calling on Congress to change federal law. This explicit Executive Branch support for marijuana industry financial services may provide a legal safe harbor for financial institutions serving marijuana-related businesses. Still, relatively few financial institutions have chosen to do so.

THE BANKING SECRECY ACT (BSA) AND ANTI-MONEY LAUNDERING



The federal Money Laundering Control Act prohibits conducting financial transactions using the proceeds of a “specified unlawful activity.” The “manufacture, importation, sale, or distribution of a controlled substance” is among the specified unlawful activities.



The federal Money Laundering Control Act prohibits conducting financial transactions using the proceeds of a “specified unlawful activity.” The “manufacture, importation, sale, or distribution of a controlled substance” is among the specified unlawful activities.² Both individuals and business entities, including financial institutions, can be prosecuted for money laundering. Specifically, a financial institution can be prosecuted for conducting a transaction involving a specified unlawful activity while “knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity or to avoid a

² 18 United States Code § 1956(c)(7).

transaction reporting requirement under State or Federal law.”³ Additionally, a financial institution may be subject to the same penalties if it “knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000.”⁴

The BSA extends these potential criminal liabilities far beyond any transactions that a financial institution undertakes *knowingly*. Indeed, the BSA can subject financial institutions to prosecution for failure to take adequate measures to proactively detect transactions that may involve the proceeds of activity considered federally illegal, including the sale of marijuana. The BSA requires every financial institution to implement a “know your customer” program and to take reasonable efforts to “verify the identity of any person seeking to open an account,” including any officers or directors who exercise control over a business account.⁵ Financial institutions must investigate the background of every account holder to a sufficient extent to assess the risk associated with that customer.⁶ For accounts posing higher risks, financial institutions are required to determine the specific purpose of each account, the source of all funds, and the primary trade or occupation of the account holder.⁷

Having acquired this general information on each customer, financial institutions must also identify and report suspicious transactions to the federal Financial Crimes Enforcement Network (FinCEN). The report must detail *any* transaction involving more than \$10,000 in cash, and any transaction involving at least \$5,000 in cash if the bank knows or suspects that the transaction involves illegal activity, is designed to avoid BSA reporting requirements, has no apparent business purpose, or is atypical for the customer.⁸

³ 18 United States Code § 1956(a)(1)(B).

⁴ 18 United States Code § 1957(a).

⁵ 31 United States Code § 5318(1).

⁶ Federal Financial Institution Examination Council. Bank Secrecy Act/Anti-Money Laundering Examination Manual. 63-65 (2010). http://www.ffiec.gov/bsa_aml_infobase/documents/bsa_aml_man_2010.pdf; See also, Hill, Julie Andersen. “Banks, Marijuana, and Federalism.” *Case Western Reserve Law Review* Vol. 65, Iss. 63 (2015), 612. <https://scholarlycommons.law.case.edu/caselrev/vol65/iss3/7>.

⁷ *Ibid.*

⁸ 31 Code of Federal Regulations § 1020.320(a)(2).

Practically speaking, many financial institutions file suspicious activity reports even when transactions do not reach these financial thresholds simply as a defensive measure against possible federal sanctions. Penalties for failing to abide by the BSA requirements are severe and can include the loss or suspension of a charter, money penalties and criminal prosecution. Institutions may face financial penalties of “not less than 2 times the amount of the transaction” for failing to adequately perform due diligence and report suspicious activity.⁹ Liabilities under the BSA extend to bank employees in their personal capacity as well. As the *BSA Examination Manual* notes, “a person, including a bank employee, willfully violating the BSA or its implementing regulations is subject to a criminal fine of up to \$250,000 or five years in prison, or both.”¹⁰

FINCEN 2014 GUIDANCE REGARDING MARIJUANA-RELATED BUSINESSES

The requirements of the BSA and Money Laundering Control Act do not expressly forbid a financial institution in the United States from providing services to a marijuana business. However, they do require extensive due diligence and reporting efforts for a financial institution to remain in compliance with these laws while servicing a marijuana-related account.



The requirements of the BSA and Money Laundering Control Act do not expressly forbid a financial institution in the United States from providing services to a marijuana business.



⁹ 31 United States Code § 5322(d).

¹⁰ Federal Financial Institution Examination Council. Bank Secrecy Act/Anti-Money Laundering Examination Manual. Note 75 (2010). http://www.ffiec.gov/bsa_aml_infobase/documents/bsa_aml_man_2010.pdf (citing 31 United States Code § 5322).

In fact, FinCEN issued additional guidance to financial institutions in 2014 specifically addressing marijuana-related businesses.¹¹ It notes that, at the date of issuance, 20 states had legalized some form of marijuana and that U.S. Deputy Attorney General James Cole had issued guidance in 2013 (the “Cole Memo”) directing U.S. attorneys to focus their enforcement of the Controlled Substances Act toward eight specific priorities. Those priorities were:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.¹²

In light of the Cole Memo’s deference to state marijuana programs with “strong and effective regulatory and enforcement systems” designed to ensure none of the eight federal priorities would be violated, FinCEN saw the need to follow the Cole Memo’s directives with specific new guidance for financial institutions. Rather than prohibit financial institutions from accepting marijuana businesses as customers, the stated purpose of the

¹¹ U.S. Department of the Treasury. Financial Crimes Enforcement Network. “BSA Expectations Regarding Marijuana-Related Businesses (FIN-2014-G001).” February 14, 2014. <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.

¹² U.S. Deputy Attorney General James Cole. “Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement.” August 29, 2013. <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

FinCEN guidance is to “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”¹³

FinCEN guidance lays forth BSA compliance expectations for financial institutions. For a marijuana-related business, a financial institution’s due diligence should include all of the following:

- Verifying with the appropriate state authorities that the business is duly licensed and registered;
- Reviewing the state license application (and related documentation) submitted by the marijuana-related business;
- Requesting available information about the business and related parties from state licensing and enforcement authorities;
- Developing an understanding of the normal and expected activity for the business, including the types of products to be sold and customers to be served (e.g. medical versus recreational customers);
- Ongoing monitoring of publicly available sources for adverse information about the business and related parties;
- Ongoing monitoring for suspicious activity, including for any of the red flags described in the FinCEN guidance; and
- Refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.

In addition to each of the above diligence and ongoing monitoring requirements, the FinCEN guidance makes clear that financial institutions should consider whether each individual transaction by a marijuana-related business implicates one of the Cole Memo priorities. It creates three new types of suspicious activity reports that financial institutions are required to file regarding their accounts with marijuana-related businesses. Financial institutions must file a “marijuana limited” suspicious activity report for accounts on which the institution believes the account holder is in compliance with state laws and has not implicated any of the Cole Memo priorities. These reports must be renewed at least every

¹³ Department of the Treasury. Financial Crimes Enforcement Network. FIN-2014-G001. “BSA Expectations Regarding Marijuana-Related Businesses.” February 14, 2014. <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.

six months indicating the continuing activity of the account holder, including details on the amount of deposits, withdrawals and transfers from the account.

If, by contrast, the financial institution has reason to believe an account holder has violated state marijuana laws or implicated one of the Cole Memo priorities, it must file a “marijuana priority” suspicious activity report that details which enforcement priorities may be implicated and the dates, amounts and other details of the transactions being reported on. Finally, a financial institution must file a “marijuana termination” suspicious activity report if it “deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program.” FinCEN retains the details of these reports to aid in possible prosecution efforts and urges an institution that files a “marijuana termination” to alert other institutions of the potential illegal activity by the marijuana-related business to inform their decisions to grant the business an account.

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Remarkably, the FinCEN guidance provides no clear definition of a “marijuana-related business.”

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Remarkably, the FinCEN guidance provides no clear definition of a “marijuana-related business.” It is unclear whether the term is intended to include only state licensees that are directly engaged in the manufacture, sale or distribution of marijuana, or to include suppliers of nutrients, soil, light fixtures or related supplies, or even legal or accounting firms that provide services to clients with marijuana licenses. In the absence of clear federal guidance on where this line should be drawn, banks are left to develop their own interpretation of what constitutes a “marijuana-related business” and have tended to err on the conservative side.

Even ancillary businesses that do not directly touch the marijuana plant are routinely denied bank accounts due to this vagueness.¹⁴ A white paper published by the Association

¹⁴ As one example, New Frontier Financials, a data analytics firm that tracks the size of the overall marijuana market, has reported having multiple bank accounts closed since 2014. See: Reed, Tina. “When Your Business Is Serving Cannabis Companies, Just Keeping A Bank Account Is

of Certified Anti-Money Laundering Specialists to guide financial institutions on their reporting obligations under the BSA interprets the FinCEN guidance to imply an obligation for institutions to not only perform due diligence on their customers, but also on the customers of their customers. For instance, in states that have legalized marijuana, the paper cautions financial institutions to review the customers of law firms, investment banks, broker-dealers and similar entities to determine whether they are doing business with a marijuana licensee. It cautions against companies “that sell or lease equipment that may be used in the production or sale of cannabis,” indicating that potting soil, fertilizer and light bulb companies, and the big-box retailers that offer those products, could all become subject to additional due diligence requirements.¹⁵



The stated purpose of the FinCEN guidance is to facilitate financial services for the marijuana industry, but it imposes substantial burdens.



The stated purpose of the FinCEN guidance is to facilitate financial services for the marijuana industry, but it imposes substantial burdens. Unsurprisingly, financial institutions have been wary about granting accounts even to entities that do business with a marijuana company, much less to marijuana companies themselves. Regardless, shortly after issuing the guidance, former FinCEN Director Jennifer Shasky Calvery characterized it as a success because more institutions began filing marijuana suspicious activity reports, which indicated to her that more institutions were offering financial services to marijuana businesses. In her words:

Tricky.” *Washington Business Journal*. April, 18, 2017.
<https://www.bizjournals.com/washington/news/2017/04/18/when-your-business-is-serving-cannabis-companies.html>.

¹⁵ Kohr, Lauren. “Weeding Through: The Challenges of Banking the Marijuana Industry.” Association of Certified Anti-Money Laundering Specialists.” August 2015. 8.
<https://www.acams.org/aml-white-paper-marijuana/>.

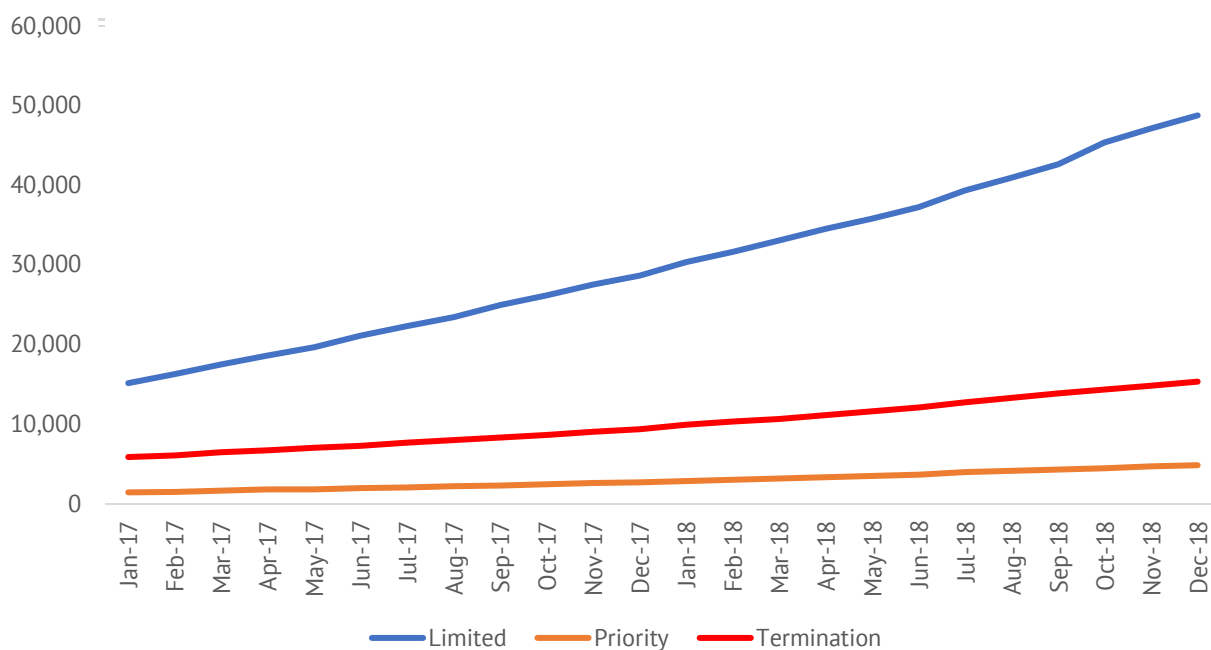
Our overarching goal in issuing this guidance was to promote financial transparency...So, from our perspective the guidance is having the intended effect. It is facilitating access to financial services, while ensuring that this activity is transparent and the funds are going into regulated financial institutions responsible for implementing appropriate AML safeguards.¹⁶

However, by Calvery's accounting, FinCEN at that time had received nearly as many marijuana termination reports (475) as marijuana limited reports (502). This indicates that most financial institutions were simply closing the accounts of marijuana-related businesses.¹⁷ More recent statistics released by FinCEN indicate that nearly 16,000 accounts have been shuttered and accompanied by a marijuana termination report. Fewer than 50,000 marijuana limited reports had been filed by September 30, 2018, or slightly more than three times the number of termination reports.¹⁸ Since marijuana limited reports must be filed on an ongoing basis to report on marijuana-related transactions, this ratio does not indicate that financial institutions are actively servicing a large volume of marijuana accounts. Instead, it appears most of these accounts are being terminated despite FinCEN's stated intentions.

¹⁶ Financial Crimes Enforcement Network. "Remarks of Jennifer Shasky Calvery, Director, Financial Crimes Enforcement Network." August 12, 2014 at the Mid-Atlantic AML Conference. <https://www.fincen.gov/news/speeches/remarks-jennifer-shasky-calvery-director-financial-crimes-enforcement-network-10>.

¹⁷ Ibid.

¹⁸ Department of the Treasury. Financial Crimes Enforcement Network. "Marijuana Banking Update." Data ending September 30, 2018. https://www.fincen.gov/sites/default/files/shared/Marijuana_Banking_Update_September_2018.pdf.

FIGURE 1: CUMULATIVE NUMBER OF MARIJUANA SUSPICIOUS ACTIVITY REPORTS FILED

Source: Author's calculations based on periodic reports published by FinCEN, available at: <https://www.fincen.gov/frequently-requested-foia-processed-records>

ADDITIONAL LEGAL CONSIDERATIONS FOR FINANCIAL INSTITUTIONS

In addition to their liabilities under the BSA and Money Laundering Control Act, financial institutions potentially could face prosecution under the Controlled Substances Act if they elect to provide banking services to a state-licensed marijuana business. Federal criminal codes state that “Whoever...aids, abets, counsels, commands, induces or procures” a federal crime “is punishable as a principal” in that crime.¹⁹ Any person who facilitates the commission of a federal crime can also be prosecuted as an accessory after the fact.²⁰ A law review article offers the example of a bank providing an inventory loan to an account holder that is a state-licensed marijuana business to demonstrate how easily a financial institution could be charged as a conspirator or accessory for the manufacture or

¹⁹ 18 United States Code § 2.

²⁰ 18 United States Code § 3.

distribution of marijuana.²¹ Financial institutions must weigh these considerations carefully in their decisions to accept marijuana licensees as customers and to determine what scope of financial services they will make available to those customers.

Further, financial institutions are required to insure their deposits. The primary designated entities for deposit insurance include the Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA). These entities are both federally chartered and have expressed reservations about granting deposit insurance to institutions that have proposed to offer services to marijuana-related businesses. The only exceptions to the requirement for federal deposit insurance through these entities are for state-chartered credit unions in nine states that permit deposit insurance to be acquired through private insurers.²²

Finally, any financial institution must acquire a master account with the Federal Reserve before it can participate in the interbank payment portals administered by that entity. This includes the clearing of checks, wires and automated debit transactions—all of which are necessary to offer even basic financial services. As will be detailed in the following sections, the Federal Reserve has refused access to these payment portals to institutions that intend to provide financial services to marijuana-related businesses.



This labyrinth of legal complications has generally stymied access by marijuana-related businesses to the financial system because financial institutions have made the business decision to avoid the risks to which they could become exposed.



²¹ Hill. “Banks, Marijuana, and Federalism.” 608.

²² These states are: Alabama, California, Idaho, Illinois, Indiana, Maryland, Nevada, Ohio and Texas. See Hill, Julie Andersen. “Banks, Marijuana, and Federalism.” *Case Western Reserve Law Review*, Vol. 65, Iss. 3 (2015). 623, note 129.

This labyrinth of legal complications has generally stymied access by marijuana-related businesses to the financial system because financial institutions have made the business decision to avoid the risks to which they could become exposed. Even the federal regulatory agencies have expressed frustration over this result. In addition to the actions of FinCEN and comments by Jennifer Shasky Calvery about trying to facilitate marijuana banking, the Federal Reserve, FDIC, NCUA and the Office of the Comptroller of the Currency issued a 2014 joint letter in response to inquiries from the governors of Colorado and Washington expressing their position. In it, the agencies state that decisions about which customers a financial institution will accept should be made by the institution “without involvement by its supervisor,” but that “further clarity from Congress on the legal treatment of state-licensed marijuana-related businesses under federal law would provide greater legal certainty for both marijuana-related businesses and banks and credit unions.”²³ This oblique prodding for congressional action is unusual for federal agency directors to adopt in their official capacities, highlighting their underlying desire to facilitate financial services for state-licensed marijuana businesses.

²³ Letter from Thomas J. Curry, Comptroller, OCC; Martin J. Gruenberg, Chairman, FDIC; Janet L. Yellen, Chair, Board of Governors of the Federal Reserve and Deborah Matz, Chairman, NCUA, to Jay Inslee, Governor of Washington. Available at: <http://www.dfi.wa.gov/documents/banks/gov-inslee-interagency-response.pdf>.

THE EXPERIENCE OF COLORADO'S FOURTH CORNER CREDIT UNION

In 2012, Colorado became the first state to legalize marijuana for recreational purposes through the passage of Amendment 64. Thereafter, Colorado lawmakers and marijuana licensees made several attempts to facilitate financial services for state licensees. The first attempt was passage of a bill that would allow marijuana businesses to form a financial services cooperative.²⁴ Any such cooperative was intended to function like a bank or credit union, accepting deposits from marijuana licensees and ancillary businesses and making loans against those deposits, although the legislation stipulated that deposits would not be insured.

Further, the intent was for the cooperative to even participate in the interbank payment systems administered by the Federal Reserve. The authorizing legislation specifically required a cooperative “to provide written evidence of approval by the Federal Reserve System Board of Governors for access by the co-op to the Federal Reserve System in

²⁴ Colorado Legislature. House Bill 14-1398 (2014).

connection with the proposed depository activities of the co-op.”²⁵ However, the cooperative authorized in the Colorado law does not meet the definition of a “depository institution” for which the Federal Reserve would normally grant a master account.²⁶ Moreover, the Colorado statute ironically requires a cooperative chartered under its authority to “comply with all applicable requirements of federal law” and to disclose to members that “[f]ederal law does not authorize financial institutions, including marijuana financial services cooperatives, to accept proceeds from activity that is illegal under federal law, such as that from licensed marijuana businesses.”²⁷ Given these complications, Colorado did not receive any applications to form a financial cooperative for marijuana-related businesses.²⁸

However, a group of organizers in Colorado chartered a traditional credit union with the explicit intention of serving marijuana-related businesses. Fourth Corner Credit Union received a charter from the Colorado Division of Financial Services in November 2014 to operate a credit union that would service marijuana-related businesses, including state-licensed cultivators, manufacturers, distributors and dispensaries in the marijuana and hemp industries.



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²⁵ Ibid.

²⁶ For greater detail, see Hill. “Banks, Marijuana, and Federalism.” 639-640.

²⁷ Colorado Legislature. House Bill 14-1398. 2014.

²⁸ Miyoga, David. “Green Light Doesn’t Suffice.” *Denver Post*. September 14, 2014.

Once the new entity applied for deposit insurance from the NCUA and a Federal Reserve master account, though, it began to run into problems. Both agencies denied the applications, citing a number of reasons. The Federal Reserve Bank of Kansas City (FRB-KC) denied Fourth Corner's master account application, claiming that:

1. the Federal Reserve retains statutory discretion over who may receive an account;
2. Fourth Corner's stated intention of servicing marijuana-related businesses in Colorado would facilitate violations of the federal Controlled Substances Act; and
3. the institution lacked deposit insurance, capital and an established track record as an operating entity.

For its part, the NCUA cited similar concerns about facilitating federally illegal activity, but also focused on factors specifically relevant to insurance underwriting. Specifically, NCUA expressed concern about the concentration of Fourth Corner's prospective clientele in a single industry. Such risk could expose the insurer to large potential losses if some event were to cripple commerce in that specific industry and, given its federally illicit status, this was more than a remote possibility. As well, the new, emerging industry had little track record upon which insurance underwriters could create expectations for future performance.²⁹

Fourth Corner responded by filing suit against the FRB-KC, asking for declaratory judgment and an injunction to force FRB-KC to issue a master account, a process that is ordinarily routine and completed within a matter of days. FRB-KC responded by arguing that Fourth Corner sought to violate the federal Controlled Substances Act by facilitating the manufacture and distribution of marijuana and that the court couldn't use its equitable powers to facilitate an illegal activity. While Fourth Corner amended its complaint to address this argument, stating repeatedly that it would only service marijuana-related businesses to the extent permitted by federal law, the district court refused to accept these claims at face value, denied the injunction, and dismissed the complaint.

Fourth Corner appealed to the Tenth Circuit U.S. Court of Appeals, where the three presiding judges each authored very different opinions. Judge Moritz agreed with the

²⁹ The NCUA denial of coverage to Fourth Corner Credit Union was issued in a private letter. However, excerpts of the letter are available in various press coverage. For example, see Popper, Nathaniel. "Banking for Pot Industry Hits a Roadblock." *New York Times*. July 30, 2015. <https://www.nytimes.com/2015/07/31/business/dealbook/federal-reserve-denies-credit-union-for-cannabis.html>.

district court's reasoning and affirmed its decision. Judge Matheson observed that the business model described in Fourth Corner's amended complaint before the district court represented a fundamental change of direction, and that no new application had been submitted to FRB-KC to alleviate its concern about marijuana-related businesses. As Matheson opined, "this case has become divorced from the factual backdrop that gave rise to the original dispute,"³⁰ and as such would not become ripe for adjudication until a new application was submitted by Fourth Corner and denied by FRB-KC.

Judge Bacharach opined that the district court erred in repudiating the amended complaint's assertions because "Fourth Corner acknowledged that the court was the sole arbiter of the law" and "would obey a ruling that servicing marijuana-related businesses is illegal."³¹ To examine whether the Federal Reserve, in fact, holds statutory discretion over the awarding of accounts, the judge analyzed the Federal Reserve's prior operating history, legislative history and court precedent, and determined that it holds no such discretion and is therefore obligated to issue a master account to depository institutions. He also held that FRB-KC had demonstrated through its briefs and oral assertions that it was likely to deny an account to Fourth Corner even upon submission of a new application and, therefore, counter to Judge Matheson, the appeal was prudentially ripe for a ruling.³²

In a 2-1 decision, the Tenth Circuit vacated the district court's decision and remanded the case with instructions to dismiss the complaint without prejudice, so Fourth Corner could re-apply for a master account. Essentially, the views of the three judges were so far apart that they adopted the view of the middle judge (Matheson).

Fourth Corner did submit a new application, but FRB-KC did not issue a master account within the standard timeframe of five to seven days. Fourth Corner filed a new complaint in district court, but eventually the two sides reached agreement. In February 2018, FRB-KC announced it would conditionally grant Fourth Corner a master account only if it obtained deposit insurance and refused to service state-licensed marijuana businesses—the entire purpose of its original charter. Fourth Corner would be able to provide accounts for

³⁰ *The Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*. Case No. 16-1016. Matheson opinion. 14. <https://www.ca10.uscourts.gov/opinions/16/16-1016.pdf>.

³¹ *Ibid.*

³² *Ibid.*

marijuana advocacy groups and ancillary businesses such as law firms that serve marijuana businesses, but not businesses or individuals that touch marijuana directly.³³



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In a separate action, Fourth Corner also brought suit against the NCUA seeking a court order to provide deposit insurance. During the time this case was pending, Fourth Corner agreed with FRB-KC to change its business model so that it would not provide services to state-licensed marijuana businesses. As a result, the district court dismissed its claim against NCUA and directed it to submit a new application to NCUA describing the new business model.³⁴ As of October 2018, Fourth Corner had not yet done so, citing concerns that it could take years for a new application to be processed.³⁵

³³ National Association of Federally-Insured Credit Unions. “Fed Approves Fourth Corner CU’s Request to Serve Marijuana Advocates.” February 6, 2018. <https://www.nafcu.org/newsroom/fed-approves-fourth-corner-cus-request-serve-marijuana-advocates>.

³⁴ *The Fourth Corner Credit Union v. National Credit Union Administration*. Available at: <https://www.nafcu.org/sites/default/files/Fourth%20Corner%20v.%20NCUA%20-%20Opinion%20and%20Order%20-%2006.25.2018.pdf>.

³⁵ Strozniak, Peter. “Pot Credit Union No Closer to Opening Date.” October 5, 2018. <https://www.cutimes.com/2018/10/05/pot-credit-union-no-closer-to-opening-date/?slreturn=20190506142900>.

CALIFORNIA'S FEASIBILITY STUDY FOR A STATE MARIJUANA BANK

Following the passage of California's Proposition 64 in 2016, which made marijuana legal in California for recreational purposes, State Treasurer John Chiang convened a Cannabis Banking Working Group to examine possible actions the state could take to facilitate financial services for state-licensed marijuana businesses. The working group comprised state agencies, trade groups, the California Bankers Association, the League of California Cities, and California State Association of Counties. All had various concerns about the public safety and compliance issues surrounding an all-cash business.

The Working Group commissioned a feasibility study to evaluate several alternative approaches, including the possibility of a state-owned bank that would service marijuana-related businesses directly. Completed in December 2018, it identified four key obstacles to banking marijuana-related businesses:

1. the potential criminal and civil liability to which a financial institution could be subject as an accomplice or conspirator to violations of the federal Controlled Substances Act;
2. the new and rapidly changing nature of the industry;

3. the administrative burden imposed by the BSA to monitor transactions and file suspicious activity reports; and
4. the fact that similar-looking sales of marijuana may or may not be legal, depending on whether the marijuana business is selling to another entity properly licensed within the state.³⁶

The study noted that a state-owned bank could face several additional obstacles:

1. If the federal government were to prosecute the bank for providing aid in the manufacture, distribution and sale of marijuana, the state, its officers and employees could face direct criminal liability.
2. The state could be defined as a “criminal enterprise” under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), which could expose it to civil as well as criminal liabilities.
3. The bank’s assets could become subject to seizure under federal civil forfeiture laws.
4. The concentration risk of servicing exclusively or primarily marijuana-related businesses would likely make the bank ineligible for deposit insurance.
5. The bank would be unlikely to secure a Federal Reserve master account through which it could settle interbank transactions, leaving it to act as “a network of cash vaults that would provide customers with the ability to transact business only with other customers of the bank.”³⁷
6. The initial capitalization needed to form a bank would require a significant outlay of public resources, and the bank would be unlikely to begin paying dividends or returning principal to state coffers for decades.
7. Any prospective change in federal law that permits the legalization of marijuana or marijuana-related banking would erode the market share of the state-run bank, leading to large losses.

³⁶ Level 4 Ventures, Inc. “State-Backed Financial Institution (Public Bank) for the State of California Servicing the Cannabis Industry, Feasibility Study 2018.” Report Prepared for the California Cannabis Banking Working Group. December 2018. 9. <https://www.treasurer.ca.gov/comm-external-urls/cannabis-feasibility-full-report.pdf>.

³⁷ Ibid. 17.

Given this barrage of complications, the study concluded that the likely costs outweigh the benefits for a state-run marijuana bank. However, in the relatively limited space the study devotes to an analysis of alternative proposals, it makes some poignant observations. It notes that “many of these problems are mitigated when an existing bank takes on cannabis banking as a small percentage of its business. The federal regulators are not primarily concerned (at least right now) with cannabis banking per se.”³⁸ Rather, the primary complication for existing banks is the administrative burden imposed by properly performing ongoing due diligence on customers, verifying the legality of individual transactions, and filing suspicious activity reports in accordance with FinCEN guidance. Therefore, the study recommended an alternative to a state-run bank: help facilitate the banking of marijuana-related businesses through existing financial institutions by lowering the costs these institutions face in performing their obligations under the BSA. Primarily, this involves a data-sharing program whereby banks could gain access to relevant information about the licensure of a marijuana-related business, the identity of its owners, and a log of legitimate transactions, which could be facilitated through access to a state’s seed-to-sale regulatory compliance database.



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³⁸ Ibid. 17.

POSSIBLE SOLUTIONS TO THE MARIJUANA BANKING ISSUE

As the preceding discussion makes clear, it is not necessarily illegal to offer financial services to marijuana-related businesses, even those that are licensed under state law to directly manufacture and distribute marijuana. To the contrary, existing FinCEN guidance was developed with the explicit purpose of facilitating financial services for these businesses. Rather, these businesses' well-documented lack of access to financial services represents a business decision by financial institutions not to offer accounts to marijuana-related businesses. While some may cite the potential legal risks involved, financial institutions recognize there are significant additional costs incurred in offering these businesses financial services within BSA's reporting framework. Many institutions will simply find it unprofitable to service these accounts. As a law review article on the issue highlights, "When comparing compliance costs with the profits available from the growing but still small marijuana industry, banking the industry may not make economic sense."³⁹

A number of regulatory compliance services have emerged to fill this market void by offering to act as an intermediary between financial institutions and the marijuana-related

³⁹ Hill. "Banks, Marijuana, and Federalism." 635.

businesses they might serve. In exchange for upfront fees and, normally, a percentage of all deposits, these compliance middlemen conduct enhanced due diligence on marijuana-related businesses that apply to ensure they are fully licensed, their ownership is disclosed, and that all sales and purchases comply with standards set forth by state licensing regimes and do not implicate any of the Cole Memo priorities. Generally, these services can arrange to pick up cash from the marijuana business by armored transport, verify that the amount and regularity of cash deposits match the records of legitimate transactions, and deliver the cash to a financial institution that has enlisted its services. Although this approach offers a technically feasible financial solution for marijuana-related businesses, the rates these intermediaries charge can be prohibitive. This author's experience with such intermediaries finds that such services may involve thousands of dollars in up-front fees to perform the required know-your-customer requirements, plus a percentage of deposits that ranges as high as 8%, depending on the vendor, and additional fees each time an armored transport vehicle is dispatched to pick up cash. In an increasingly competitive industry, this fee structure can significantly deteriorate or even eliminate a business's operating margin.

ACTIONS STATES CAN TAKE

Notably, the bulk of these middlemen's services involves collecting and sharing with financial institutions the same information that marijuana licensees must submit as part of their license application and the transaction data that are included in the state-administered track-and-trace regulatory systems. This observation strengthens the California Treasurer's recommendation: Since state regulators already possess this information, a data-sharing program with existing financial institutions will likely overcome the information void that makes their reporting obligations under the BSA so costly.



Notably, the bulk of these middlemen's services involves collecting and sharing with financial institutions the same information that marijuana licensees must submit as part of their license application and the transaction data that are included in the state-administered track-and-trace regulatory systems.



Of course, constructing a data-sharing platform may not be simple. For instance, state laws regarding privacy, negligence and tort generally require authorities not to disclose personal or financial information about licensees to third parties without the licensee's permission. In practice, this means programmers must design a portal with private logins that restrict a financial institution's access to its account holders' business information, while other data remain anonymous or restricted. A financial institution may require comparisons of its clients' transactions to those of other licensees to assess whether its account holders' transactions appear anomalous or suspicious compared to their local marijuana industry peers. This means that financial institutions may need anonymous access to summarized statistics or transaction data for the entire network of licensees, including those without that institution's accounts. This can render a specialized data-sharing platform's programming rules complex.

Nonetheless, some states have already pioneered this kind of platform. Michigan, for instance, will soon launch its data-sharing platform prepared by vendor NCS Analytics.⁴⁰ The vendor's platform provides a tool for regulators, authorized financial institutions and state auditors to analyze specific marijuana licensees' transactional data to identify red flags through comparison with predictive analytics of expected general market activity transaction levels and types. This kind of data-sharing platform should substantially ease institutions' financial and administrative burdens in offering accounts to marijuana-related businesses.

ACTIONS AVAILABLE TO PRIVATE ENTREPRENEURS

To address marijuana-related businesses' need for banking services, the feasibility study offered the nontraditional alternative of using modern financial technology, including cryptocurrency, to facilitate electronic payment transfers. But the study dismissed this option abruptly as unworkable because cryptocurrency funds eventually must re-enter the traditional financial system, and that all possible points of entry are frustrated by the same BSA compliance issues that plague marijuana-related businesses in general.

However, outright dismissal of a cryptocurrency-based solution appears premature. First, the need to convert cryptocurrency funds back into dollars to enter the financial services

⁴⁰ Brisbo, Andrew. Director of Michigan Marijuana Regulatory Agency. In discussion with the author. June 11, 2019.

sector results primarily from a lack of critical mass in cryptocurrency usage. In other words, if all or most businesses or individuals used cryptocurrency for purchases and payments, then the electronic wallet used to store cryptocurrency would essentially function as a bank account and payments could be sent electronically to other users in secure fashion.



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However, even without its widespread use for everyday transactions, a cryptocurrency-based solution for the marijuana industry's banking needs is technically feasible. Such a payment platform would need to establish a partnership with a FinCEN-registered money services business with the BSA's know-your-customer and reporting requirements capability. These businesses can mediate compliance for a marijuana-related business transacting on a cryptocurrency platform with a bank or credit union. The certified money services business would establish a bank account dedicated to clearing transactions from the cryptocurrency platform. To encourage rapid adoption and ease of use, a marijuana-related business's customers could use their debit cards to purchase cryptocurrency, which would be minted on the spot and accepted by the marijuana-related business as payment for goods. The cryptocurrency should trade at a fixed exchange rate against the dollar to prevent currency risk and the marijuana-related business could use this currency to pay its vendors directly, or it could redeem the cryptocurrency against the clearing account maintained by the money services business to receive dollars. Upon redemption, the corresponding units of cryptocurrency would be burned and disappear from circulation, effectively making the clearing account maintained by the money services business a full reserve bank for marijuana-related businesses that complies with the BSA and related banking laws. This type of arrangement would effectively shift the regulatory liability from the bank or credit union that holds the account to the FinCEN-registered money services business, and the money services business and cryptocurrency platform could charge small

transaction fees as compensation for their services. The money services business will already have access to relevant information about the underlying transactions through the cryptocurrency's distributed ledger, and therefore avoids the manual processes required of alternative compliance services. Moreover, because the clearing account is maintained at an existing financial institution, the solution needn't acquire a new Federal Reserve master account nor federal deposit insurance.⁴¹



... these transactions would take place electronically on the back end of a customer's purchase, so marijuana customers would not need to learn how to trade in cryptocurrency directly.



Critically, these transactions would take place electronically on the back end of a customer's purchase, so marijuana customers would not need to learn how to trade in cryptocurrency directly. This feature would help ensure rapid user adoption.

Many variations on this arrangement are possible. The critical components of any such venture are: (1) it must find a way to comply with BSA reporting requirements and related banking laws; (2) it should control for currency risk by using a fixed exchange rate; and (3) the user interface should remain simple enough not to frustrate user adoption. Such a full-reserve cryptocurrency clearing account arrangement within an existing bank or credit union would solve the need for financial services to marijuana-related businesses while avoiding the complications of a new financial institution being denied deposit insurance and a Federal Reserve master account.

A second alternative might be to charter a credit union in one of the nine states that permit credit unions to acquire deposit insurance through a source other than the NCUA and that is located within the jurisdiction of a U.S. District Court of Appeals other than the Tenth Circuit. Given the division of opinions rendered by the Tenth Circuit judges in the Fourth

⁴¹ At least one cryptocurrency offering has been developed conceptually along this model, although it has not advanced to market. See *Mota Coin White Paper*. April 2018. <https://motacoin.io/wp-content/uploads/2018/04/Motacoin-White-Paper.pdf>.

Corner case, a different circuit court could reach different conclusions and perhaps require the Federal Reserve to issue a master account to any qualified applicant.

PROSPECTIVE FEDERAL ACTION

One major obstacle to developing state-administered or private banking alternatives is the looming possibility that Congress could pass new legislation to facilitate financial services for marijuana-related businesses. While federal legislation could solve the issue entirely, uncertainty regarding the possibility and timing of its passage may discourage the investments necessary to develop alternative structures.



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In March 2019, the House Financial Services Committee voted to advance the Secure and Fair Enforcement (SAFE) Banking Act to the floor of the U.S. House of Representatives on a 45-15 vote. The SAFE Banking Act addresses financial services for “cannabis-related legitimate businesses,” which generally refers to a compliant, state-licensed marijuana business. It would:

1. prohibit federal regulators from limiting the availability of share or deposit insurance to financial institutions that accept a cannabis-related legitimate business customer;
2. require FinCEN to develop new guidance on marijuana-related suspicious activity reports so that financial institutions are not discouraged from offering services to a cannabis-related legitimate business;
3. prohibit federal regulators from penalizing a financial institution that accepts, processes or clears payments for cannabis-related legitimate businesses; and

4. protect financial institutions, their officers, directors and personnel from prosecution under federal law simply for providing financial services to a cannabis-related legitimate business.⁴²

Although the Act has not yet advanced to the House floor for a vote, it has amassed 206 cosponsors⁴³ and enjoys the support of powerful bank lobbying groups, including the American Bankers' Association.⁴⁴ In a May 2019 letter to congressional leadership, 38 state and territory attorneys general also expressed support for the SAFE Banking Act.⁴⁵ Then, in a June 2019 letter, the governors of 18 states and two U.S. territories wrote to congressional leadership expressing support for the Act.⁴⁶

Even as momentum builds toward the Act's prospective passage, expectations for its effect should be tempered. At most, the SAFE Banking Act may make existing banks more willing to accept marijuana-related businesses as checking account customers. The safe harbors included in the Act do not provide substantial protection to financial institutions that provide business loans or other financing mechanisms to marijuana businesses, meaning that private investments and capital markets would continue to provide most of the capital to the industry. This carries significant social equity considerations, since access to capital is a key barrier for many would-be entrepreneurs from communities disproportionately affected by the War on Drugs.

⁴² For a technical summary of the Act, see Allen, Christopher L. et al. "SAFE Banking Act, Increasing Access to Banking Services for Legitimate Marijuana-Related Businesses." Arnold & Porter Kaye Scholer LLP. March 29, 2019. <https://www.arnoldporter.com/en/perspectives/publications/2019/03/safe-banking-act>.

⁴³ United States Congress. H.R. 1595, SAFE Banking Act of 2019. <https://www.congress.gov/bill/116th-congress/house-bill/1595/cosponsors>.

⁴⁴ American Bankers Association. "ABA Voices Support for Cannabis Banking Legislation." *ABA Banking Journal*. April 12, 2019. <https://bankingjournal.aba.com/2019/04/aba-voices-support-for-cannabis-banking-legislation/>.

⁴⁵ National Association of Attorneys General. Letter to Congressional Leaders. May 8, 2019. <https://www.naag.org/assets/redesign/files/sign-on-letter/NAAG%20Letter%20-%20SAFE%20Banking%20Act%20of%202019.pdf>.

⁴⁶ Congressman Ed Perlmutter. "20 Bipartisan Governors Urge Congress to Pass Marijuana Banking Bill." June 14, 2019. <https://perlmutter.house.gov/news/documentsingle.aspx?DocumentID=4554>.

Further, the Act would protect financial institutions only inasmuch as they offer services to businesses that are in full compliance with respective state laws. However, state regulatory requirements for licensed marijuana businesses vary substantially, meaning that financial institutions would need to develop expertise on diverse regulatory regimes to evaluate compliance. This costly administrative burden could easily discourage financial institutions from offering accounts to marijuana businesses in the same way existing FinCEN guidance has done.



..., while the SAFE Banking Act would improve the status quo, it is not a panacea for financial services to the marijuana industry.



Therefore, while the SAFE Banking Act would improve the status quo, it is not a panacea for financial services to the marijuana industry. Ultimately, the only federal action that could provide equitable financial services to the industry is a change in federal treatment of the underlying transactions. That is, Congress could either direct the Drug Enforcement Administration to declassify marijuana under the Controlled Substances Act, pass alternative legislation to provide a safe harbor from the Controlled Substances Act in states that allow marijuana to be produced and sold for medical or recreational purposes, or the Drug Enforcement Administration could commence a declassification hearing for marijuana on its own accord.

POTENTIAL RAMIFICATIONS OF NOT PERMITTING FINANCIAL SERVICES TO MARIJUANA BUSINESSES

As this brief illustrates, a variety of mechanisms could facilitate financial services for the marijuana industry, including actions by states and private entrepreneurs, even in the absence of federal action. Yet, while Congress debates the SAFE Banking Act and similar legislation, a solution to the marijuana banking issue is imperative.

Stories abound detailing the public safety risks posed by large amounts of cash housed at or transported by marijuana companies. The public is largely aware that even legitimate marijuana companies deal mainly in cash, and this has inspired robbers to target these companies.⁴⁷ Even law enforcement has struggled with the temptation to rob marijuana companies, as illustrated by a Los Angeles County sheriff's deputy who pled guilty to

⁴⁷ See, e.g., Thompson, Marc. "Officials Urging Cannabis Businesses to Beef Up Security After Increase in Robberies." *CBS Sacramento*. January 25, 2019. <https://sacramento.cbslocal.com/2019/01/25/cannabis-security-recent-robberies/>.

robbing a marijuana warehouse early in 2019.⁴⁸ Cash management and security has been a challenge for government offices that receive tax payments in cash. Even the federal Internal Revenue Service has a difficult time processing cash tax payments made by state-licensed marijuana companies. The agency pays a reported \$1.7 million to an external processing firm to handle the cash payments.⁴⁹



Beyond these problems lie much more fundamental concerns about forcing a large and growing industry to operate almost exclusively in cash. Namely, it is far more difficult to ensure a marijuana business is compliant when it has no banking records for state and federal regulators to review.



Beyond these problems lie much more fundamental concerns about forcing a large and growing industry to operate almost exclusively in cash. Namely, it is far more difficult to ensure a marijuana business is compliant when it has no banking records for state and federal regulators to review. Cash-intensive businesses have both the incentive and ability to conceal revenues in order to reduce their tax liabilities. The federal Internal Revenue Service has specifically targeted cash-only businesses as subjects of its field audits for this reason.⁵⁰ Potential tax fraud isn't the only concern that arises from cash-intensive businesses—for instance, a marijuana wholesaler could conceivably make sales to unlicensed (or even black-market) entities and maintain no record of the transaction when

⁴⁸ Rubin, Joel. "Los Angeles County Sheriff's Deputy to Plea Guilty in Robbery of Marijuana Warehouse." *Los Angeles Times*. January 17, 2019. <https://www.latimes.com/local/lanow/la-me-pot-heist-plea-20190117-story.html>.

⁴⁹ Rohrlich, Justin. "Cannabis Companies Are Paying Federal Taxes in Cash and It's Giving the IRS a Headache." *Quartz*. November 14, 2018. <https://qz.com/1461947/the-irs-cant-handle-cannabis-companies-all-cash-tax-payments/>.

⁵⁰ Pavlo, Walter. "'Cash Only' Small Business Targeted by IRS: The Case of Nick's Roast Beef." *Forbes*. December 15, 2015. <https://www.forbes.com/sites/walterpavlo/2015/12/15/cash-only-small-business-targeted-by-irs-the-case-of-nicks-roast-beef/#506f154542dc>.

all sales are made in cash. Thus, it becomes more—not less—difficult to ensure that state-licensed marijuana businesses do not implicate any of the Cole Memo priorities when they are forced to operate outside the banking system. Indeed, most concerns voiced by marijuana legalization opponents are exacerbated by excluding state-licensed marijuana businesses from financial services.



At the most fundamental level, the rise of a major consumer industry that is systematically excluded from access to traditional financial services could pose an existential threat to the financial services sector itself.



At the most fundamental level, the rise of a major consumer industry that is systematically excluded from access to traditional financial services could pose an existential threat to the financial services sector itself. Entrepreneurs are constantly innovating with new products and ideas that overcome shortcomings in the marketplace and the marijuana banking issue is certainly no exception. Financial technology firms have actively been trying to develop alternative solutions that would allow legitimate marijuana businesses to make and receive electronic payments, including many cryptocurrency-based approaches. Early attempts like PotCoin have yet to achieve substantial market penetration, but it would be naïve to believe that subsequent iterations may not offer both businesses and individuals the basic financial services they need outside the traditional banking system. If that happens, businesses and individuals outside the marijuana industry may be attracted to these new technologies and away from the traditional banking system as well.

Instead of using their control over the banking system to strangle the state-licensed marijuana industry, federal authorities could potentially allow the marijuana industry and its ancillary businesses to render that banking system obsolete altogether. This might become the greatest and most enduring legacy of marijuana legalization by the states.

Congress can free up the marijuana industry's access to traditional banking or thwart it further, but the current situation is unsafe, obstructive and unsustainable.

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